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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC LAMONT ESMOND, Defendant and Appellant.	B206143 (Los Angeles County Super. Ct. No. BA312625)

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Reversed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Sarah J. Farhat, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Eric Lamont Esmond appeals from a judgment of conviction entered after his motion to suppress (Pen. Code, § 1538.5[1]) was denied, and he pled no contest to having a concealed firearm and carrying a loaded, unregistered firearm. He contends his motion should have been granted. We agree, and reverse the judgment.

PROCEDURAL BACKGROUND

The District Attorney filed a two-count information charging defendant with (1) having a concealed firearm, and (2) carrying a loaded, unregistered firearm. (§§ 12025, subd. (a)(2), 12031, subd. (a)(1).) Defendant moved to suppress evidence. The motion was denied.

Defendant pled no contest to both counts. Imposition of sentence was suspended and defendant was placed on probation for three years and ordered to serve 365 days in county jail. This appeal followed.

FACTUAL BACKGROUND

Viewed in the light most favorable to the judgment (*People v. Hill* (2000) 23 Cal.4th 853, 855), the evidence established the following: On the morning of November 10, 2006, Officers Cardenas and Gonzales of the Los Angeles Police Department were patrolling in a residential area on 84th Street. They saw a group of 10-12 men on the sidewalk, some of whom were working on a car parked in front of a house at 2106 West 84th Street. As the officers drove near, they smelled the odor of burnt or burning marijuana.[2] They stopped their patrol car and got out.

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[1] All undesignated statutory references are to the Penal Code.

[2] The smell was variously described as "marijuana," "burning" marijuana, and "burnt" marijuana. Cardenas, the only officer to testify at the suppression hearing, first said he smelled an "odor of marijuana" in the air as he drove down the street. When asked to clarify whether he smelled "burning" marijuana, or "just the odor of marijuana" in general, Cardenas said it had been "burning" marijuana. Based on his experience and

As the officers approached, two men from the group, defendant and Deon Cannon, stepped backwards, moving off the sidewalk onto the lawn. They appeared nervous. Cardenas noticed Cannon had a "blunt" (marijuana cigarette) behind his ear and advised both Cannon and defendant they were being detained for a narcotics investigation. Based on his training, about nine years' experience as a police officer and work at the probation department, and the men's body language, Cardenas believed both men appeared suspicious, as though they had something to hide. Defendant and Cannon told the officers they were on private property where they had no business and said they had no reason to detain them.

The officers repeated to defendant and Cannon that they were being detained and ordered them to stay put. Cannon complied. Defendant turned and walked away. The officers ordered defendant to stop, but he kept walking. He opened a gate and went into the backyard. Both officers followed, believing defendant might try to discard or destroy additional narcotics or weapons. In the backyard, defendant pulled a handgun from his waistband and tossed it to the ground. The officers ordered him to stop and lie on the ground. Defendant complied. They took him into custody and recovered the gun. At no time did the officers see anyone smoke marijuana or throw anything away, and they never recovered any smoked marijuana from the location.

Cannon testified that he lived at 2106 West 84th Street. He and defendant have been friends for six or seven years, and defendant is a frequent overnight guest at Cannon's house. Defendant helps Cannon install electronic equipment in cars, which is what they were doing when the officers arrived. Cannon said defendant was in the backyard getting tools when the police arrived.

DISCUSSION

Defendant contends the trial court erred when it denied his suppression motion because the officers lacked reasonable suspicion to detain him. We agree.

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training, Cardenas recognized that smell as distinctly different than that of unburnt marijuana. Thereafter, Cardenas testified only that he smelled "burnt" marijuana.

Standard of review

On appeal from a ruling on a suppression motion under section 1538.5, we defer to the trial court's factual findings, express or implied, if those findings are supported by substantial evidence. (*People v. Ramos* (2004) 34 Cal.4th 494, 505; *People v. Ayala* (2000) 23 Cal.4th 225, 255.) However, the trial court's legal determination of whether the search or seizure was reasonable under the Fourth Amendment is reviewed de novo. (*People v. Ramos*, *supra*, 34 Cal.4th at p. 505; *People v. Ayala*, *supra*, 23 Cal.4th at p. 255.)

The police officers lacked a reasonable suspicion to detain defendant

"'A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.'" (*People v. Hester* (2004) 119 Cal.App.4th 376, 386, quoting *People v. Souza* (1994) 9 Cal.4th 224, 231; accord *Terry v. Ohio* (1968) 392 U.S. 1, 21 [88 S.Ct. 1868].) An investigative stop or detention is not constitutionally authorized unless the circumstances are reasonably consistent with criminal activity. (*Arburn v. Department of Motor Vehicles* (2007) 151 Cal.App.4th 1480, 1484.) Curiosity, rumor or hunch alone will not justify an investigative stop. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) Defendant maintains the officers' initial stop was unlawful, and the observations made and evidence recovered thereafter, all of which flowed directly from the illegal detention, should have been suppressed.

A warrantless search or seizure, such as occurred in this case, is presumed unreasonable under the Fourth Amendment unless the prosecution can show by a preponderance of the evidence that the search is justified under one of the exceptions to the warrant requirement. (*People v. Osband* (1996) 13 Cal.4th 622, 673.) "The Fourth Amendment . . . prohibits seizures of persons, including brief investigative stops, when

they are 'unreasonable.' [Citations.] Our state Constitution has a similar provision. [Citation.] A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away. [Citation.]" (*People v. Souza, supra,* 9 Cal.4th at p. 229.) For a detention to be constitutionally reasonable, the detaining officer must have "a reasonable, articulable suspicion that criminal activity is afoot." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123 [120 S.Ct. 673].) "'Although police officers may not arrest or search a suspect without probable cause and an exception to the warrant requirement, they may temporarily detain a suspect based only on a "reasonable suspicion" that the suspect has committed or is about to commit a crime. [Citations.] Such detentions are permitted, notwithstanding the Fourth Amendment's requirements of probable cause and a search warrant, because they are "limited intrusions" that are "justified by special law enforcement interests." [Citations.]' [Citation.]" (*People v. Durazo* (2004) 124 Cal.App.4th 728, 734.) The question here is whether the officers' attempted detention of defendant was constitutionally permissible.[3] We find it was not.

According to Cardenas, when the officers approached the men assembled near the car there was nothing particularly suspicious about defendant; he was "just a part of the group," and "looked like he was hanging out with everyone else." When Cannon and defendant stepped back, Cardenas saw the blunt behind Cannon's ear. Cardenas, who decided that the blunt had been the source of the odor of burnt marijuana, told the two men "they were going to be detained for [a] narcotics investigation" and ordered them not to move. Cardenas was suspicious of defendant, as opposed to the other 10 men nearby, because only he stepped back with Cannon and they were the only ones to tell the officers they had no business being on private property. Cardenas's suspicions about defendant, who appeared "a little nervous" from the outset, were heightened when he turned to walk away. It was Cardenas's experience that, when the police tell someone to do something,

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[3] Cardenas testified that, once the officers approached the group, defendant was detained and not free to leave. The parties agree the officers tried to detain defendant upon arrival.

and that person does not "want to go with the program, that means [he has] something, [he's] wanted, or [he's] going to do something." In Cardenas's opinion, a person with nothing to hide would "basically . . . stay there." But, someone with "something to hide, be it drugs, warrants, guns, whatever it is," tends to "appear . . . more nervous."

A detention is constitutionally reasonable only if the detaining officer has specific, articulable facts that cause him or her to suspect some criminal activity has occurred, is occurring or is about to occur, and the individual he intends to detain is involved in that activity. (*Terry v. Ohio*, *supra*, 392 U.S. at p. 21; *In re Tony C.*, *supra*, 21 Cal.3d at p. 892.) Here, the officers had a reasonable suspicion that someone in the group had smoked marijuana. Once they saw the blunt behind Cannon's ear, they were justified in detaining him.[4] However, the mere fact that defendant moved backwards with his friend did not warrant singling out *defendant* for detention. It was mid-morning. There is no evidence the neighborhood was a high crime area or that the officers had any prior knowledge of criminal activity by anyone at the house that morning. There is also no evidence defendant appeared to be under the influence of any substance or, apart from looking "a little nervous," that he behaved oddly. No one, apart from defendant and Cannon, was even stopped. The record strongly indicates the only factor distinguishing defendant from the rest of the group was that he took a step back with his friend. That act did not justify defendant's detention and gave the officers no reasonable basis to believe he was involved in a crime.

Moreover, the fact that defendant turned and walked away, after being told to stay, provides no basis for his initial detention or the subsequent warrantless search. True, under proper circumstances, an individual's decision to leave after being told to remain by a police officer may be considered suspicious. Those circumstances are not present in this case. "The departure of defendant . . . from an imminent intrusion cannot bootstrap an illegal detention into one that is legal." (*People v. Aldridge* (1984) 35 Cal.3d 473, 479.) All of the officers' subsequent observations and their recovery of the gun flowed

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[4] Possession of marijuana is a misdemeanor. (Health & Saf. Code, § 11357, subd. (b).)

directly from defendant's illegal detention. Accordingly, that evidence should have been suppressed. (*People v. Mayfield* (1997) 14 Cal.4th 668, 760 [facts officers learn after the detention cannot be used to justify the detention itself].)

None of the cases upon which the People rely supports a contrary conclusion; each case upheld a detention based on circumstances more suspicious than present here. In *Illinois v. Wardlow*, *supra*, 528 U.S. 119, the defendant fled when he saw police officers patrolling an area known for heavy narcotics trafficking. The court held that defendant's unprovoked flight, upon noticing the police, was sufficient to raise a reasonable suspicion based on common sense judgment and inferences about human behavior: "Headlong flight — wherever it occurs — is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." (*Id*. at p. 124.) Similarly, in *People v. Souza*, *supra*, 9 Cal.4th 224, the defendant fled from an apparent auto burglary the police happened upon at 3:00 a.m. in a high crime area. (*Id*. at pp. 240-242.) The court held, even though the "defendant took off running," that act, on its own, was insufficient to justify a detention. (*Id*. at p. 227.) But it was key because fleeing the police, as opposed to refusing to cooperate, is inherently suspicious. (*Id*. at p. 235.)

Defendant's act of walking away from the officers was significantly less suspicious than the conduct in either *Illinois v. Wardlow* or *People v. Souza*. Instead of following an order to stay put, defendant – whom the record indicates was doing nothing more suspicious than hanging out with friends working on a car, mid-morning in a residential neighborhood – turned and walked away. That act was not enough to arouse a reasonable suspicion that he was engaged in criminal activity. (*People v. Souza*, *supra*, 9 Cal.4th at p. 231.) The motion to suppress should have been granted.[5]

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[5] Given our conclusion that defendant's detention was unlawful, we need not reach the People's contention that exigent circumstances justified the warrantless search or that defendant lacks standing to challenge the gun's seizure.

DISPOSITION

The order denying defendant's suppression motion and the resulting judgment are reversed.

NOT TO BE PUBLISHED

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.